

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2010

Ref. No.: GLS-4478
PSF No.: 10HD-189

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

HAWAII

Approve the Withdrawal of Approximately 2,226.683 Acres from General Lease No. S-4478, Boteilho Hawaii Enterprises, Inc., Lessee, Parcel 3, Government Lands of Kaohe 2nd, Hamakua, Hawaii, Tax Map Key: 3rd/4-3-10: portion of 2;

Approval in Concept of the Set-Aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife, Consisting of 2,226.683 Acres for Addition to the Mauna Kea Forest Reserve; Issuance of Immediate Management Right-of-Entry, Parcel 3, Government Land of Kaohe 2nd, Hamakua, Hawaii, Tax Map Key: 3rd/4-3-10:02 portion of 2.

APPLICANTS AND REQUESTS:

Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW), for withdrawal of approximately 2,226.683 acres from General Lease No. S-4478; Approval in concept of the set-aside of 2,226.683 acres to DOFAW for addition to the Mauna Kea Forest Reserve; and Issuance of immediate management right-of-entry covering such 2,226.683 acres.

LEGAL REFERENCE:

Sections 171-11 and 37, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Parcel 3, Government Land of Kaohe 2nd, Hamakua, Hawaii, identified by Tax Map Key: 3rd/4-3-10: portion of 2, as shown on the attached maps labeled Exhibit A.

AREA:

Original leased area –	7,932.36 acres, more or less.
Area for withdrawal & Set Aside to DOFAW –	<u>2,226.683 acres, more or less</u>
Area remaining under General Lease No. S-4478 –	5,705.677 acres, more or less.

ZONING:

State Land Use District: Agriculture
County of Hawaii CZO: A-40a

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

LEASE CHARACTER OF USE:

Pasture purposes, and alternate agriculture on 10% of lands not affected by the Palila Critical Habitat Mitigation easement.

TERM OF LEASE:

Originally, 35 years, commencing on March 1, 1976 and expiring on February 28, 2011. Lessee received a 20-year extension commencing on March 1, 2011 and expiring on February 28, 2031.

LEASE ANNUAL RENTAL:

Current rent is \$24,300.00, due in quarterly installments of \$6,075.00 on June 1, September 1, December 1, and March 1 of each year. However, Lessee is currently paying its rent on a monthly basis.

RENTAL REOPENINGS:

Reopenings in the original term were at the end of the 10th, 20th and 30th years of the term. The last rental reopening (immediate reopening) occurred on January 9, 2004. The next rental reopening is scheduled for March 1, 2014.

PURPOSE OF SET-ASIDE:

For addition to Mauna Kea Forest Reserve.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See Exemption Notification attached below as **Exhibit B**.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

1. Process and obtain subdivision approval for the area to be withdrawn from TMK: 3rd/ 4-3-10: portion of 2 and any consolidation with abutting State lands, if necessary, using available Federal Highway Administration (FHWA) and/or State Department of Transportation (SDOT) funding; and
2. Provide survey maps and descriptions according to State DAGS standards for both the withdrawn area and the lands remaining under General Lease No. S-4478, using available FHWA and/or SDOT funding;

REMARKS:

General Lease No. S-4478, a 35-year pasture lease that commenced on March 1, 1976, was awarded at a public auction held on August 28, 1975 to Boteilho Hawaii Enterprises, Inc., as the highest bidder.

At its meetings of December 14, 2001 (Item D-37) and November 15, 2002 (Item D-19), the Board approved, as amended, the grant of a 10-year term, non-exclusive easement to the State Department of Transportation (SDOT) in connection with the Saddle Road improvement project for Palila Critical Habitat (PCH) Mitigation purposes. As a condition to granting the PCH Mitigation easement, the Board agreed in principle to extend the terms of General Lease No. S-4478 and other affected leases in accordance with the provisions of Section 171-36(b), HRS, as amended, to assist in compensating the lessees for the lands made subject to the easement.

The Board and SDOT thereafter executed Grant of Non-Exclusive Easement No. S-5665 with an effective date of November 27, 2002 (the PCH Mitigation Easement). The PCH Mitigation Easement restricted Lessee's grazing rights and use of approximately 2,226.683 acres of mauka pasturelands leased under General Lease No. S-4478.¹ The easement area was fenced using United States Department of Transportation, Federal Highway Administration (FHWA) and/or United States Department of Defense funds, and domestic and feral ungulates, including cattle and sheep, were removed from the area.

¹ An Amendment of General Lease No. S-4478 entered into on February 10, 2003 stated that the area of the Palila mitigation easement was 2,228.384 acres, which is 1.701 acres more than the 2,226.683 acres set forth in General Lease No. S-5665, the PCH Mitigation Easement. The 2,228.384-acre figure was an estimate that was made prior to the survey of the easement area. As set forth in the PCH Mitigation Easement, the actual area of the easement affecting the Lessee's lands is 2,226.683 acres. It is not clear why the estimated figure was incorporated into the lease amendment. The PCH Mitigation Easement figure controls. Land Division will need to make accounting adjustments as necessary to ensure that Lessee has paid, and going forward will pay, rent that factors in the correct PCH Mitigation Easement area.

Before the PCH Mitigation Easement went into effect, SDOT contacted the affected lessees and advised them of their right to make a claim under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Assistance Act). Under the provisions of this Act, the lessees would have been entitled to compensation for actual, reasonable moving expenses, and for permanent improvements made to the leased land affected by the easement in accordance with the leases. Staff understands from SDOT that the lessees did not submit claims for assistance under the Act.

At its meeting of January 9, 2004, Item D-21, the Board consented to a mortgage and 20-year extension of the term of General Lease No. S-4478. An Extension of General Lease No. S-4478 was entered into between the State and Lessee as of September 10, 2004.

Beginning in 2004 and continuing presently, pursuant to the intent of the Biological Opinion of the U.S. Fish and Wildlife Service (USFWS) for the Saddle Road Realignment and Improvement Project dated July 27, 1998, the Division of Forestry and Wildlife (DOFAW) has conducted a forest restoration program on the PCH Mitigation Easement area for the purpose of providing long-term habitat for Palila at considerable effort to the State and with significant progress to date.

By letter dated October 24, 2009, FHWA advised DLNR that consultations with USFWS had resulted in the issuance of a new Biological Opinion for the Saddle Road project on September 11, 2009 (BO). This action was taken in part because of USFWS' concern that the 10-year term of PCH Mitigation Easement is inadequate to establish and maintain a viable mamane forest capable of supporting a self-sustaining Palila population in compliance with the BO. The BO committed USFWS and FHWA to ensure the PCH Mitigation Easement areas serve as long-term habitat for Palila recovery. The FHWA letter explained that if the PCH Mitigation Easement area is not added to the State's forest system, or otherwise set aside for a term sufficient to restore Palila habitat, FHWA will likely be found in violation of the BO, which could result in the cessation of all activities on the Saddle Road project using federal funding.

To remedy this situation and to retain the significant progress that has been made in the long-term restoration of the site, DOFAW has requested that the PCH Mitigation Easement area be withdrawn from General Lease No. S-4478 and set aside to DOFAW as an addition to the Mauna Kea Forest Reserve. DOFAW will coordinate with SDOT, USFWS and others to ensure that the withdrawn area continues to be managed for PCH Mitigation purposes. The set-aside to DOFAW will be subject to the PCH Mitigation Easement, which will remain in effect until it expires by its own terms.²

² In addition to its effect on portions of General Lease No. S-4478, the PCH Mitigation Easement also affected portions of General Lease Nos. GL S-4471 to Parker Ranch, Inc., GL S-4475 to KK Ranch, Inc., and GL S-4477 to SC Ranch Co., Inc., in connection with the Saddle Road improvements project for PCH mitigation purposes. DOFAW has conducted significant forest restoration activities on those PCH mitigation areas as well. At its meeting of September 9,

In accordance with the Memorandum of Understanding Regarding Implementation of the Saddle Road Palila Critical Habitat Mitigation, dated August 10, 1999 signed by FHWA, USFWS, SDOT, DLNR and others, all costs related to the subdivision of the lands for the purpose of the set-aside of the PCH Mitigation Easement area shall be borne by FHWA and/or SDOT.

The last rental reopening occurred on January 9, 2004. The next rental reopening is scheduled for March 1, 2014. There are no outstanding rental reopening issues.

Comments were solicited from the government agencies identified below with the results indicated.

Agency	Comment
County:	
COH-Planning Department	No response
State:	
Dept of Agriculture	No response
DOFAW-Na Ala Hele	No objections
SDOT	No objections
Federal:	
FHWA	No objections
USFWS	No response
Other:	
OHA	No response

Additionally, a draft of the present Board submittal was sent to Lessee on October 19, 2010, and no comments were received from the Lessee on the request.

Staff recommends that no further compensation or rent relief be offered to Lessee as a result of the withdrawal. As discussed above, the Board previously reduced Lessee's rent in proportion to the land area encumbered by the easement. SDOT offered to compensate Lessee under the Relocation Assistance Act when the PCH Mitigation Easement was initially put in place and Lessee did not submit a claim. No further compensation or relief is warranted.

2010, under agenda Item D-17, the Board approved, as amended, the withdrawal of the PCH Mitigation Easement area from GL S-4475. DOFAW has also requested the easement area under GL S-4477 be permanently withdrawn and set aside for addition to the Mauna Kea Forest Reserve, and that matter is before the Board under a separate submittal. With respect to GL S-4471, staff is awaiting the receipt of an application for extension of the lease, and the extension and withdrawal request may come before the Board in the near future.

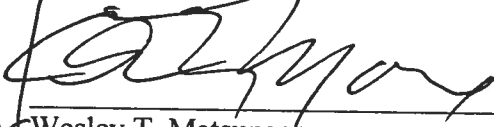
RECOMMENDATION:

That the Board, subject to the Applicants fulfilling the Applicant requirements listed above:

1. Approve the withdrawal of approximately 2,226.683 acres from General Lease No. 4478, Boteilho Hawaii Enterprises, Inc., Lessee.
2. Approve in concept the set-aside of the withdrawn 2,226.683 acres to the Department of Land and Natural Resources, Division of Forestry and Wildlife, under the terms and conditions cited above, which are by this reference incorporated herein. The set-aside to DOFAW for addition to the forest reserve shall be subject to staff returning to the Board at a later date to report the results of the public hearing held pursuant to Recommendation Number 3, below.
3. Pursuant to HRS Section 183-11, as amended, authorize the Division of Forestry and Wildlife to conduct a public hearing on the Island of Hawaii regarding the proposed addition of approximately 2,226.683 acres to Mauna Kea Forest Reserve at Ka'ohe 2nd, Hamakua, Hawaii, Tax Map Keys: 3rd/4-3-10: portion of 2, and further, pursuant to HRS Section 183-12, as amended, authorize the Chairperson to:
 - A. Set the date, location and time of the public hearing; and
 - B. Appoint a hearing master(s) for the public hearing.
4. Authorize the issuance of an immediate management right-of-entry permit to the Division of Forestry and Wildlife covering the withdrawn 2,226.683 acres under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current management right-of-entry permit form, as may be amended from time to time;
 - B. The management right-of-entry shall remain in effect until the executive order setting aside the land to the Division of Forestry and Wildlife is finalized; and


- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



for Wesley T. Matsunaga
Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thiele, Chairperson

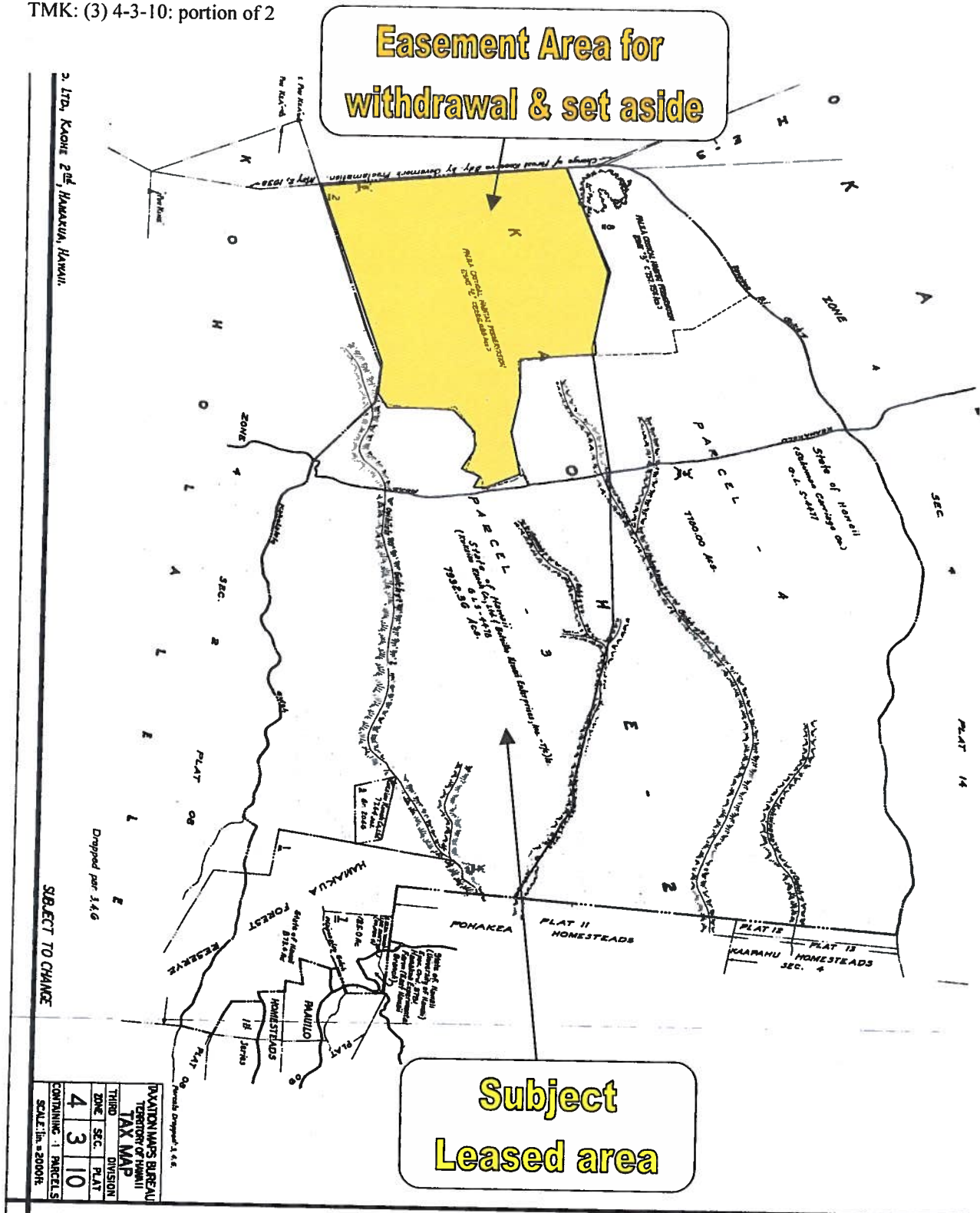


EXHIBIT A

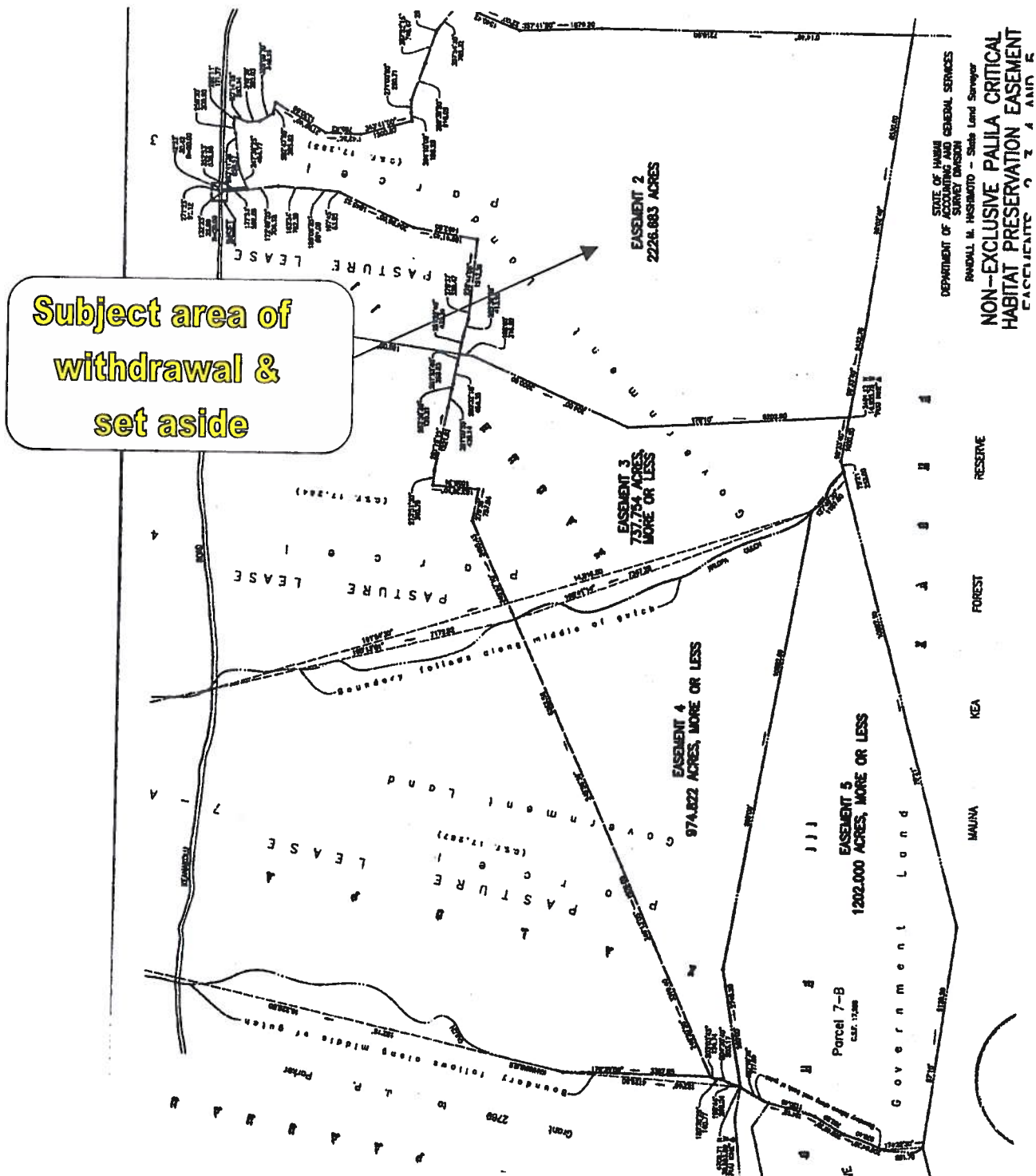
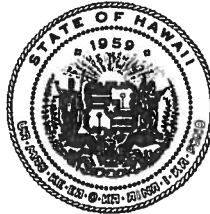


EXHIBIT A

LINDA LINGLE
GOVERNOR OF HAWAII

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

EXEMPTION NOTIFICATION

From the preparation of an environmental assessment under the authority of Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Withdrawal of Approximately 2,226.683 Acres from General Lease No. S-4478, Boteilho Hawaii Enterprises, Inc., Lessee; and Approval In Concept of the Set-Aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife, of such 2,226.683 Acres for Addition to the Mauna Kea Forest Reserve, and Issuance of Immediate Management Right-of-Entry

Project Number: PSF No. 10HD-189

Project Location: Government Lands of Kaohe 2nd, Hamakua, Hawaii, Tax Map Key: 3rd/4-3-10:02 por.

Project Description: Withdraw approximately 2,226.683 Acres from General Lease No. S-4478, Boteilho Hawaii Enterprises, Inc., Lessee; Approve in concept the set-aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife, of such 2,226.683 acres for addition to the Mauna Kea Forest Reserve.

Consulted Parties: State Department of Transportation – Highways; U.S. Department of Transportation, Federal Highway Administration; U.S. Fish and Wildlife Service; and others

Exemption Class No.: In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment under the following:

EXHIBIT "B"

Exemption Class No. 1, which states, "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

With respect to the withdrawal from General Lease No. S-4478 and approval in concept of the set-aside to DOFAW, the action is merely a transfer of management jurisdiction and does not constitute a use of State lands or funds, and therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements.

Recommendation: The subject land is currently under lease to Boteilho Hawaii Enterprises, Inc. for pasture purposes pursuant to General Lease No. S-4478, and a portion of the lease premises is encumbered by Grant of Easement No. S-5665 preserving land for Palila Critical Habitat Mitigation purposes. The purpose of the withdrawal and set-aside of the portion of the lease encumbered by the easement to DOFAW is to add the land to the Mauna Kea Forest Reserve. As such, the proposed withdrawal and set-aside would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

The withdrawal from the lease and the approval in concept of the set-aside to DOFAW will probably have minimal or no significant effect on the environment. It is recommended that the Board of Land and Natural Resources find that the proposed action is exempt from the preparation of an environmental assessment. Inasmuch as the Chapter 343 environmental requirements apply to DOFAW's proposed use of a portion of the lands for an addition to the Mauna Kea Forest Reserve, DOFAW shall be responsible for compliance with Chapter 343, HRS, as amended.

Laura H. Thielen, Chairperson

Date